

STATE OF MICHIGAN
COURT OF APPEALS

U.S. MOTORS, PRAHA MOTORS, L.L.C.,
BRATISLAVA MOTORS, L.L.C., U.S. MOTORS
(SK), and JOSEPH LEVIN,

UNPUBLISHED
January 17, 2012

Plaintiffs-Appellants,

v

GENERAL MOTORS EUROPE,

Defendant-Appellee.

No. 299901
Wayne Circuit Court
LC No. 10-001791-CZ

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting summary disposition for defendant under MCR 2.116(C)(7) in this contract dispute. Because plaintiffs filed their complaint well after the expiration of the statute of limitations and their claim is barred by res judicata and the "two dismissal rule" of Fed R Civ P 41(a)(1), we affirm.

This is the fifth lawsuit that plaintiffs and their privies have filed against defendant for breach of a 1995 agreement. The first action was filed on October 31, 2002, in the United States District Court for the Eastern District of Michigan. On March 24, 2004, the court entered a stipulated "Order of Discontinuance Without Prejudice" dismissing the action, but providing that a lawsuit filed within six months after entry of the order will be deemed to have been commenced on October 31, 2002, for statute of limitations purposes. On September 23, 2004, one day before the expiration of the six-month window, plaintiffs and their privies filed their second lawsuit against defendant in the United States District Court, asserting essentially the same allegations. On February 7, 2005, they voluntarily dismissed that action.

On July 10, 2007, plaintiffs and U.S. Motors (CZ), a Czech limited liability company, filed a third complaint against defendant in the United States District Court, again asserting the same allegations. The following day, they voluntarily dismissed the action, and, on the same day, plaintiffs filed a fourth complaint, asserting the same allegations. The fourth complaint omitted U.S. Motors (CZ) as a plaintiff, purportedly to cure a violation of Czech law. Defendant moved to dismiss the complaint, arguing that it was barred by the statute of limitations and the "two-dismissal rule" of Fed R Civ P 41(a)(1). In lieu of ruling on the motion, the court

dismissed the complaint on October 24, 2007, for lack of subject matter jurisdiction based on no diversity of citizenship.

On February 11, 2010, plaintiffs filed the instant action in the Wayne Circuit Court, asserting the same allegations that were asserted in the federal actions. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' claim was barred by the statute of limitations and res judicata based on the two-dismissal rule set forth in Fed R Civ P 41(a)(1). The trial court agreed and granted defendant's motion on both grounds.

We review de novo a trial court's decision on a motion for summary disposition. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred on the basis of a prior judgment or the statute of limitations. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010); *Hanley*, 239 Mich App at 600. In reviewing a motion under subrule (C)(7), we accept as true the plaintiff's well-pleaded allegations and construe them in the plaintiff's favor. *Hanley*, 239 Mich App at 600. We also review de novo as a question of law the applicability of the doctrine of res judicata. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Plaintiffs first argue that they timely filed their complaint within the six-year statute of limitations for breach of contract actions. See MCL 600.5807(8); *Miller-Davis Co v Ahrens Constr, Inc*, 489 Mich 355, 357-358; 802 NW2d 33 (2011). Plaintiffs contend that this action is based on the July 13, 2001, breach of a March 1995 agreement between defendant and General Motors Overseas Distribution Corporation. Plaintiffs assert that the two 2007 actions were also based on the breach of the March 1995 agreement, but that the 2002 and 2004 actions were not. Notwithstanding that the six-year statutory limitations period for the purported July 13, 2001, breach expired well before plaintiffs filed their February 11, 2010, complaint in this case, the record shows that all five actions were based on the breach of a December 8, 1995, agreement rather than the alleged March 1995 agreement. A review of the record shows that all five complaints asserted essentially the same allegations involving the November 1, 1996, breach of the December 8, 1995, agreement. In fact, plaintiffs and U.S. Motors (CZ) attached a copy of the December 8, 1995, agreement to their complaint filed on July 10, 2007. Thus, the record fails to support plaintiffs' argument that the complaint in this case, and those in the 2007 actions, alleged the breach of an agreement other than the December 8, 1995, agreement.

The six-year statute of limitations with respect to the December 8, 1995, agreement expired before plaintiffs filed their complaint in this case. The limitations period in a breach of contract action begins to run on the date that the breach occurs. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 355; 771 NW2d 411 (2009). Plaintiffs alleged in their complaint that the breach occurred on November 1, 1996. Thus, the statute of limitations expired on November 1, 2002. Plaintiffs and their privies filed their first complaint in federal court on October 31, 2002, just one day before the expiration of the limitations period. The limitations period was tolled during the pendency of that action. See MCL 600.5856; *Sherrell v Bugaski*, 169 Mich App 10, 17; 425 NW2d 707 (1988) (the limitations period is tolled "during the pendency of a prior suit between the parties where the prior action was not adjudicated on the merits.") The parties stipulated to the dismissal of the action, with the caveat that the refile of the action within six months would be deemed to have been commenced on October 31, 2002.

Plaintiffs and their privies refiled the action within the six-month window, but voluntarily dismissed their complaint on February 7, 2005. Because there was only one day remaining with the limitations period, the statute of limitations expired the following day, on February 8, 2005. Accordingly, the trial court did not err by granting summary disposition for defendant based on plaintiffs' failure to file their complaint within the six-year statute of limitations.

Further, the trial court properly granted summary disposition in defendant's favor based on res judicata and the two-dismissal rule of Fed R Civ P 41(a)(1). The doctrine of res judicata precludes multiple lawsuits alleging the same cause of action. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata applies regardless of whether the prior action was in federal or state court. *McKane v Lansing*, 244 Mich App 462, 466; 625 NW2d 796 (2001). The purpose of the doctrine is "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication." *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006).

The "two dismissal rule" of Fed R Civ P 41(a)(1), pertaining to a plaintiff's voluntary dismissals, provides that "the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal—or state—court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Thus, "Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action 'based on or including the same claim.'" *Cooter & Gell v Hartmarx Corp*, 496 US 384, 394; 110 S Ct 2447; 110 L Ed 2d 359 (1990), quoting Fed R Civ P 41(a)(1). "If the plaintiff invokes Rule 41(a)(1) a second time for an 'action based on or including the same claim,' the action must be dismissed with prejudice." *Id.*, quoting Fed R Civ P 41(a)(1).

Here, plaintiffs and their privies voluntarily dismissed their second and third lawsuits against defendant. Under Fed R Civ P 41(a)(1), the dismissal of the third action operated as an adjudication on the merits. Plaintiffs argue that the dismissal of the third action was required to cure a violation of Czech law and that they filed their fourth complaint only nine minutes after the third action was dismissed. Plaintiffs contend that, under these circumstances, the purposes of the two-dismissal rule, i.e., to prevent unreasonable abuse and harassment, would not be served. Plaintiffs' motives for dismissing their action, however, are irrelevant and do not preclude the operation of Fed R Civ P 41(a)(1). See *Lake at Las Vegas Investors Group, Inc v*

Pacific Malibu Dev Corp, 933 F2d 724, 725, 727-728 (CA 9, 1991) (stating that “[t]he Rule does not require an inquiry into the circumstances of the two dismissals[,] and upholding the application of Fed R Civ P 41(a)(1) when the complaint was refiled immediately after one of the dismissals). Thus, because the dismissal of the third lawsuit operated as an adjudication on the merits, plaintiffs’ complaint in this case asserted the same claim, and both actions involve the same parties or their privies, res judicata bars plaintiffs’ claim. *Dart*, 460 Mich at 586. Accordingly, the trial court properly granted defendant’s motion for summary disposition on this basis.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause